



THE CORONERS AND JUSTICE ACT 2009: '(A)MENDING' THE LAW ON PROVOCATION?

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Abstract:

This article identifies the criticisms with the partial defence of provocation and examines whether the new loss of control defence, as enacted under the Coroners and Justice Act 2009, addresses these criticisms and creates an effective defence.

Keywords: partial defence to murder, provocation, loss of control, Coroners and Justice Act 2009

Introduction

The theory underlying provocation can be traced back to medieval times and the notion of morality and politics. Failure to treat a man of honour in high regard was considered offensive and as such merited retaliation in anger, so as to demonstrate that the man was not a coward.² Horder argues that it was this concept of honour which informed the early common law relating to provocation.³

Provocation was later developed in *Duffy*,⁴ which provided the definition of provocation adopted by the Homicide Act 1957. This Act reformed the defence and clarified that a successful plea of provocation will reduce a charge of murder to voluntary manslaughter. This is beneficial for the defendant as it results in a lesser sentence and allows them to avoid the social stigma of being known as a murderer.

Three main criticisms with the defence were identified by the judiciary. These related to the

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² Casey, J., 'Gillon v HM Advocate: provocation, proportionality and the ordinary person', (2006) 30 *Scots Law Times* 193 at p.197.

³ Horder, J., *Provocation and Responsibility*, (Oxford, Clarendon Press: 1992), p.137.

⁴ *R v Duffy* [1949] 1 All E.R. 932

loss of self-control element, the provocative conduct and the objective test. The Law Commission later accepted these in their initial report in 2004⁵ as being the main reasons why the defence was in need of reform. The Commission noted that the defence especially failed defendants who were victims of domestic abuse and recognised that the problems needed to be rectified in order to establish a more effective defence. The Commission published their final report,⁶ proposing to abolish provocation and establish a new defence in accordance with the recommendations set out in their earlier report.

The Government accepted the Commission's reasoning for reform,⁷ only making a few changes in their final report⁸ before implementing the Coroners and Justice Act 2009. This article will consider the reasons behind the reform of provocation and whether loss of control demonstrates a more effective partial defence to murder, or whether more reforms are needed.

1 Loss of Self-Control: Unnecessary and Undesirable?

Section 54(1)(a) CJA sets out that the defendant's conduct must have resulted from a loss of self-control. This cannot require that the defendant *completely* lost control of their actions and so was not aware of what they were doing. Furthermore, s.54(2) stipulates that this loss of self-control does not need to be sudden.

Problems with the loss of self-control requirement

Historically, the law took the uncomplicated view that provocation could be relied on whenever the defendant was provoked into a rage.⁹ The requirement of 'loss of control' came into force in the nineteenth century and brought with it a lack of clarity. Lord Devlin defined loss of control in *Duffy* as

a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make [him] for the moment not master of his mind.¹⁰

Significant weight was put on the 'sudden and temporary' requirements resulting in them being considered preconditions of provocation. This led to judges struggling to interpret and

⁵ Law Commission, *Partial Defences to Murder*, (2004, Law Commission No 290).

⁶ Law Commission, *Murder, Manslaughter and Infanticide*, (2006, Law Commission No 304).

⁷ Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (2008, CP No.19/08).

⁸ Ministry of Justice, *Murder, Manslaughter and Infanticide: Summary of Responses and Government Position*, (2009, CP(R) No.19/08).

⁹ Law Commission, *Murder, Manslaughter and Infanticide*, at para. 5.17.

¹⁰ *R v Duffy* [1949] 1 All E.R. 932 as per Lord Devlin.

apply the definition to the facts of different cases causing contrasting views.¹¹ Complaints of gender bias also arose as the importance of the 'suddenness' requirement carried disastrous consequences for battered women who killed, due to there being a time delay between the provocative act and the killing,¹² as shown in *Ahluwalia*.¹³

The Commission recognised that the concept of loss of control had proved to be troublesome, particularly in the context of 'battered women syndrome' cases. A 'judicially invented concept',¹⁴ the loss of control requirement lacked the psychological understanding of how men and women react differently. Psychiatrists have noted that those who 'give vent to anger by losing self-control' will do so in circumstances in which they can afford to. A man who is provoked by a woman can afford to act on his anger, whereas a woman provoked by a man may feel less likely to lose self-control out of fear they could come off worse.¹⁵ Horder identifies the loss of self-control concept as a 'dilemma'. Structured around a hypothetical defendant who is 'stereotypically male with violent reactions to provocation',¹⁶ the loss of control requirement clearly reflects the way in which men are likely to respond when provoked, as they are the ones more likely to express anger and lose self-control by 'flying off the handle'.¹⁷ On this reflection the law appears sympathetic towards men who 'snap', whilst making the defence almost unavailable for women who are driven to kill after years of abuse.¹⁸

The difficulties faced by battered women have been well documented.¹⁹ *Thornton*²⁰ challenged the misuse of the 'suddenness' requirement as a rule of law and demonstrated the difficulties for battered women in using the defence. This case concerned a battered woman who, during an argument, went into the kitchen, picked up a knife and then returned and killed her husband. The argument put forward by her counsel was that the legal concept of provocation did not require the loss of self-control to be sudden and that the requirement had been incorporated into the law by a too literal interpretation of Devlin's definition in

¹¹ See *Duffy* for a narrow approach of the requirement, and *R v Ahluwalia* [1992] 4 All E.R. 889 for a broad approach.

¹² Edwards, S., 'Justice Devlin's legacy: Duffy - a battered woman "caught" in time', (2009) 12 *Criminal Law Review* 851 at p.855.

¹³ *R v Ahluwalia* [1992] 4 All E.R. 889.

¹⁴ Law Commission, *Partial Defences to Murder*, para.3.30.

¹⁵ *ibid.*, para.3.28.

¹⁶ Horder, J., 'Reshaping the subjective element in the provocation defence', (2005) 25(1) *Oxford Journal of Legal Studies* 123 at pp.127 and 136.

¹⁷ Withey, C., 'Loss of control, loss of opportunity?', (2011) 4 *Criminal Law Review* 263 at p.265.

¹⁸ Herring, J., *Criminal Law: Text, Cases, and Materials*, (Oxford University Press, 2012), p.309.

¹⁹ See Edwards, S., 'Descent into murder: provocation's stricture - the prognosis for women who kill men who abuse them', (2007) 71(4) *Journal of Criminal Law* 342.

²⁰ *R v Thornton (No1)* [1992] 1 All E.R. 306.

Duffy.²¹

This argument was rejected and the defendant sentenced to murder on the grounds that there needed to be, but was not, a sudden and temporary loss of self-control. It was not until the second appeal that the courts considered the notion of a 'slow-burn reaction'. The judiciary extended the loss of self-control concept to include this notion in response to the criticism that the law was inaccessible to battered women. Herring states that battered women are sometimes said to exhibit a 'slow-burn reaction' whereby instead of lashing out in anger after provocation, their anger slowly increases until sometime after the provocative incident in which they finally exhibit violence.²²

However, despite the judiciary extending the concept to include 'slow-burn' cases, the defence may not always be available to battered women where there is a larger time gap between the victim's last provocative act and the conduct taken. This was demonstrated in *Ahluwalia* where provocation was not accepted as there was evidence of planning. Diminished responsibility was, however, accepted as a defence.²³ Lord Taylor CJ noted that some allowance should be made to accommodate a lapse of time in cases concerning battered women. He recognised that battered women were likely to display delayed reactions and that, as a rule, the courts should not rule out the defence altogether. Still, he accepted that the line had to be drawn somewhere and that if there was a long period of time between the victim's last provocative act and the defendant's reaction, or if there was evidence of revenge or premeditation, then the likelihood is that the defence will not be successful.²⁴

The Commission found that whilst the courts extended the concept of loss of self-control to include 'slow-burn' cases, they did not modify the law completely and made the concept of loss of self-control even more unclear.²⁵ In response to the realisation that provocation did not easily accommodate the circumstances of domestic violence, the Commission published its proposals to change the defence of homicide.²⁶

The Law Commission's proposals

After providing a strong critique of the loss of self-control requirement, the Commission

²¹ Edwards, S., 'Justice Devlin's legacy', p.856.

²² Herring, J., *Criminal Law*, p.309.

²³ See Nicholson, D., and Sanghvi, R., 'Battered women and provocation: the implications of R v Ahluwalia', (1993) Oct *Criminal Law Review* 728 at p.737 for a critical discussion on shoe-horning battered women under the defence of diminished responsibility.

²⁴ *R. v Ahluwalia*, as per Judge Taylor at para.138.

²⁵ Law Commission, *Partial Defences to Murder*, para.3.29.

²⁶ Law Commission, *Partial Defences to Murder*, (2003, Law Commission No 173).

proposed reformulating the partial defence without reference to this 'unnecessary and undesirable' element.²⁷ This position reflected an inclusionary perspective²⁸ that the Commission wanted to adopt, after consideration of cases that failed to succeed with the old defence.

The Commission outlined a scenario involving an abused woman who suffers a grave attack but then, motivated by fear and thinking it is the only way to escape the abuse, waits until her attacker is asleep before she strikes. The Commission's view was that for the defence to apply in the type of case where the defendant kills in fear of serious violence, removal of the loss of self-control requirement was essential. Referring to the scenario they considered that it would be wrong to rule out her plea 'simply because there was no evidence of a loss of self-control'.²⁹ The essence of the defence is fear and thus the law should not also require the defendant to suffer a loss of self-control.

Norrie refers to the philosophy of the Commission's idea as one of 'imperfect justification', a departure from the underpinning of the old law of provocation which he identified as one of 'compassionate excuse'. He explained that 'imperfect justification' reflected a justified emotion that the defendant feels and the fact that it is ultimately wrong to kill is the imperfection. He asserts that it would therefore be inappropriate to require a loss of self-control as part of the defence, as the emotions that the defendant feels provide a sufficient justification to the unjust conduct.³⁰ For example, a battered woman may have acted when she had emotionally reached boiling point and this may have been a justified emotion despite the ability to retain self-control.³¹ To have a requirement of loss of control would in fact take the moral edge off what has been done in righteous anger.³²

Norrie's views reflect the thought process of the Commission in deciding the reforms. He asserted that the Commission viewed anger as a justified emotion that was not 'morally impermissible', but that was a normal and sometimes appropriate response to certain words or actions.³³ This response demonstrates the human frailty and one could therefore argue that it may be 'a sign of moral weakness or human coldness not to feel strong anger'.³⁴ Although anger cannot fully justify a violent response, the Commission stated that a killing in

²⁷ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.17.

²⁸ Withey, C., 'Loss of control, loss of opportunity?', p.265

²⁹ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.29.

³⁰ Norrie, A., 'The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control', (2010) 4 *Criminal Law Review* 275 at pp.278-279.

³¹ Withey, C., 'Loss of control, loss of opportunity?', p.265.

³² Norrie, A., 'The Coroners and Justice Act 2009', p.278.

³³ *ibid.*, p.277.

³⁴ Law Commission, *Partial Defences to Murder*, para.3.38

anger caused by a serious wrongdoing is 'ethically less wicked' than killing out of jealousy or greed and as such is deserving of a lesser punishment.³⁵

The Commission pointed out that it was an excusatory rationale which informed the Homicide Act. In contrast to the proposed law this underlying theoretical approach was based on excuse, rather than justification.³⁶ Norrie coined this 'compassionate excuse', which reflects the fact that as the person is held to have lost self-control, their act is from the start marked as wrong.³⁷ At the same time, it can 'in appropriate circumstances be understood...sympathised with' and as such can be partially excused. Under this approach the law condemned the act done and the loss of control, but still extended compassion to the defendant thereby viewing them with sympathy. This attitude of provocation is clear acknowledgment for the weakness of people and an acceptance that they can react rashly and make mistakes.

The Government's response

The Government was not persuaded by the Commission's proposals to remove the loss of self-control requirement. Whilst they understood the reasoning behind the proposals, the Ministry of Justice identified a 'fundamental problem' in that the defence could be available to defendants who are killing whilst in full possession of their senses.³⁸ Although a battered woman may be frightened, she is still in possession of her senses, and this should not be available in situations other than self-defence.

The Government also identified a risk of the defence being used inappropriately, such as in revenge killings, and as such believed that it was important that the defence was ground in the notion of a loss of self-control to avoid the danger of opening it up to cold-blooded killings.³⁹ They instead adopted an exclusionary approach which retained the loss of control requirement at the heart of the defence. This therefore compromised the Commission's 'imperfect justification' idea.⁴⁰

In order to strike a balance between addressing the problems highlighted by the Commission, namely the issues surrounding battered women, whilst avoiding opening the defence up to revenge killings, the Government proposed to remove the requirement for a 'sudden' loss of self-control. This allows for situations where the defendant's reaction has built gradually or

³⁵ *ibid.*, para.3.29.

³⁶ *ibid.*, para.3.21.

³⁷ Norrie, A., 'The Coroners and Justice Act 2009', p.279.

³⁸ Ministry of Justice, *Proposals for Reform of the Law*, para.36.

³⁹ *ibid.*, para.62

⁴⁰ Withey, C., 'Loss of control, loss of opportunity?', p.266.

been delayed, such as in domestic violence cases.⁴¹

However, the opinion of Maria Eagle MP was that if there was a significant delay between the relevant provocative incident and the killing, the claim that the defendant killed following a loss of self-control would be undermined and the partial defence 'not made out'.⁴² This supports the view expressed by Lord Taylor in *Ahluwalia*, who recognised that a battered women could have a delayed reaction, but accepted that a significant delay could negate the defence.

Improvement to the old law?

By removing the immediacy principle the Government ensured that the loss of self-control defence is more accessible to abused women.⁴³ Not needing to be 'sudden' could make it easier for battered women to raise this partial defence instead of being stigmatised with having to raise a defence of diminished responsibility. Nevertheless, although loss of self-control does not need to be sudden, the Explanatory Notes confirm that it will remain open for the judge and jury to determine whether the defendant did lose self-control, by taking into account any time delay. This could generate case law regarding what constitutes an acceptable delay and what could amount to a considered desire for revenge. Therefore, despite the Government's assurance that the new defence will 'allow sufficient flexibility for individual circumstances...such as in domestic violence',⁴⁴ battered women will still have difficulty in using the defence. *Ibrams*⁴⁵ failed under provocation as there was a five day delay between the provocative conduct and the killing. On this evidence the case would also fail under the new defence. Other than recognising women's fear as a trigger and a slight lapse in time there does not appear to be any real difference from the old law as battered women still need to prove a loss of self-control.

Withey recognises that 'slow-burn' cases are therefore still likely to prove difficult if abused partners kill after a period of delay, even though they experience a loss of self-control in being unable to refrain from killing. The Government has appeared to defeat the Commission's objective in widening the defence to the fear of violence cases. In spite of removing the 'sudden' element, by retaining the loss of control requirement, the Government appears to 'take back with one hand what it gives with the other'.⁴⁶

⁴¹ Ministry of Justice, *Proposals for Reform of the Law*, para.36.

⁴² HC, Public Bill Committee, Maria Eagle, col.434 (March 3, 2009.)

⁴³ HL Deb Vol. 495 Col. 584 7 July 2009.

⁴⁴ HC, Public Bill Committee, Maria Eagle, col.434 (March 3, 2009).

⁴⁵ *R v Ibrams* (1982) 74 Cr. App. R. 154.

⁴⁶ Withey, C., 'Loss of control, loss of opportunity?', p.267.

2 Triggering a Loss of Self-Control.

It is not enough to show that the defendant lost self-control, s.54(1)(b) requires that the defendant was provoked into losing self-control as a result of a qualifying trigger. Section 55 identifies two qualifying triggers which are prescribed conditions as to when a defendant may have lost self-control. Section 55(3) sets out the first trigger which is where a fear of serious violence caused the defendant to lose self-control. The second is where the defendant had a justifiable sense of being wronged (s.55(4)).

Problems with 'provocative conduct'

Formerly, under s.3 HA any things done and/or said could amount to provocative conduct. Hogan and Smith argued that this was unsatisfactory and that as long as the defendant lost self-control it should not have mattered what caused them to.⁴⁷ However, Herring states that those who accept the 'justification' rationale require a 'sufficiently serious'⁴⁸ trigger and so have criticised the broadness of the definition as it could result in almost any conduct giving rise to the defence. This was also noted by the Commission who explained that by interpreting the word 'provoked' in s.3 HA as meaning no more than 'caused', conduct that was of a minor character or even entirely lawful could qualify as provocation.⁴⁹ This is clearly demonstrated in *Doughty*⁵⁰ where the crying of a baby was capable of constituting provocative conduct. Gardner and Macklem argued that in order to morally excuse an angry reaction, the provocative act that justifies the loss of control must be something that is recognised and accepted by society as something that could be classed as a provoking insult within the standards of the community. A crying baby therefore should not be regarded as provocative conduct.⁵¹

Under the old law the defendant could argue that sexual infidelity caused them to feel a justifiable sense of being wronged. In *Davies*⁵² when directing the jury to consider whether there was provocation, the judge directed them to take into account the actions of the wife, including her infidelity. Accepting that sexual infidelity could amount to a trigger and give rise to the defence of provocation attracted wide criticism and a claim of gender bias, on the grounds that in such situations the jury was being too sympathetic towards men who killed their unfaithful partner.⁵³

⁴⁷ Hogan, B., and Smith, J.C., *Criminal Law*, (2002), p.366.

⁴⁸ Herring, J., *Criminal Law*, (2012), p.303.

⁴⁹ Law Commission, *Partial Defences to Murder*, para.3.25.

⁵⁰ *R v Doughty* [1986] *Crim. L.R.* 625

⁵¹ Herring, *Criminal Law*, p.303; Gardner, J., and Macklem, T., 'Provocation and Pluralism', (2001) 64(6) *Modern Law Review*, 815.

⁵² *R v Davies* [1975] 1 All E.R. 890.

⁵³ Herring, *Criminal Law*, p.248.

Whilst broad in the fact that almost any conduct could constitute a loss of control, one of the main criticisms of the old law was that it was too restrictive. The Commission recognised that although the defence was only available where there was evidence the defendant was provoked to lose their control, this aspect of the defence was only concerned with anger and not reactions prompted by fear.⁵⁴ By requiring a response in anger Miles observed that s.3 HA 'shoehorns the battered spouse's case into a model that it does not readily fit'.⁵⁵ By valuing the emotion of sudden anger over the emotion of fear, the defence excluded abused women who killed because of fear.

The Law Commission's proposals

The Commission recognised the need to reshape the defence. By proposing a pre-requisite that the defence should be in response to an identified qualifying trigger, the Commission addressed the broadness issue and restricted it so that it would no longer apply to 'provocative' conduct that was in fact blameless or trivial.⁵⁶ The Commission also proposed to extend provocation to include actions taken out of fear. They identified that in comparison with Scottish law, where murder is reduced to culpable homicide when there is a fatal but proportionate overreaction to physical violence, UK law was deficient. The 'rigid insistence on confining the provocation plea to angry reactions' had prevented the defence from developing at common law.⁵⁷ The Commission proposed to deal with the deficiencies, mainly the complaint of gender bias, by abolishing the loss of control requirement, recommending the new partial defence should 'be available where D killed in response to a fear of serious violence'.⁵⁸ This departure from the old law was aimed at solving the problem of domestic killings by assisting defendants who fear violence at the hands of an abusive partner and subsequently kill.

The Commission gave two illustrations why the law, in situations that fall outside the parameters of self-defence, should be modified to consider actions taken out of fear.⁵⁹ Both examples highlighted two common sets of facts which due to the deficiency of the old law failed to constitute a defence of provocation. The acceptance of a fear trigger is once again acknowledgment of the 'imperfect justification' rationale submitted by Norrie. Recognising fear as a trigger is based on Gardner's view that 'fear may be an appropriate and justified, if

⁵⁴ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.49.

⁵⁵ Miles, J., 'The Coroners and Justice Act 2009: A 'Dog's Breakfast' of Homicide Reform', (2009) 10 *Archbold News* 6 at p.8.

⁵⁶ Law Commission, *Partial Defences to Murder*, para.3.65.

⁵⁷ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.50.

⁵⁸ *ibid.*, para.5.55.

⁵⁹ Law Commission, *Murder, Manslaughter and Infanticide*, at para. 5.50

overall wrongful, emotional response'.⁶⁰

There was perhaps an element of discrimination under the old law. When a person lost self-control and killed, due to being put in extreme fear, they would face a charge of murder. Whereas, had the person's reaction been one of anger, a conviction of manslaughter was more likely. This demonstrates the issue of gender bias as a man is more likely to react in anger than a woman who is often the weaker party. The Commission's proposals appear to address the prejudiced approach of the old law and provide a justification for people who kill out of fear, such as abused women.

The proposals were subject to criticism from academics and the senior judiciary. The concern was not one relating to the inclusion of provocation in response to fear, but an issue of whether this should be a separate defence or one joined with provocation in response to anger. The main concern was that the Commission were proposing to link *two conceptually* different partial defences; provocation and excessive force in self-defence, as the situations were morally different.⁶¹ The Commission's response stated that there was 'medical, practical and moral justification for the proposed combination'.⁶² This was supported by the Royal College of Psychiatrists who stated it would be wrong to create two separate defences for those who act out of fear or anger, as medically the two emotions are not distinct and 'many mental states that accompany killing also incorporate psychologically both anger and fear'.⁶³ HHJ Stewart QC also commented in support stating:

I agree that the trigger should be gross provocation by words or conduct or fear of serious violence to self or another which caused the defendant to have a justifiable sense of being seriously wronged.⁶⁴

The Government's response

The Government accepted the Commission's proposals stating it was a 'logical means of reaching outcomes which we think are generally being reached now'.⁶⁵ There was, however, a notable difference between the law proposed and the law enacted. Where the Commission set out to reform the defence of provocation, the Government stressed their intention to 'abolish' provocation and replace it with 'two new partial defences'.⁶⁶ Furthermore, the

⁶⁰ Gardner, J., 'The Gist of Excuses', (1998) 1 *Buffalo Criminal Law Review* 575 cited in Law Commission, *Murder, Manslaughter and Infanticide*, para.5.42.

⁶¹ Law Commission, *Partial Defences to Murder*, paras.3.93-3.94.

⁶² *ibid.*, para.3.98.

⁶³ *ibid.*, para.3.99.

⁶⁴ *ibid.*, para.3.108.

⁶⁵ Ministry of Justice, *Proposals for Reform of the Law*, para.28.

⁶⁶ Ministry of Justice, *Summary of Responses*, para.9.

Commission cast their recommendations in a way that entailed that the loss of control requirement be abandoned, but the new defence, as its name suggests, keeps the requirement as a key element. While the Government did not abolish the loss of control aspect, they adopted the Commission's proposal of adding a qualifying trigger of 'fear' in order to avoid a gender bias. The proposal of a fear trigger received significant support and was recognised as a 'welcome shift from the traditional model of provocation based around anger'.⁶⁷ The respondents supported the Government's rationale to enact a fear trigger so as to improve the position of battered women wanting to use such a defence and concluded that the Government had clearly recognised the realities of domestic abuse victims.

In relation to the second trigger of 'things said or done', the Government made a change to the law which was not considered by the Commission, but was instead highlighted through their own analysis of the defence. Acknowledgement that the history of provocation had led to a defence that could be used by men who killed their wives out of sexual jealousy,⁶⁸ led to the Government disregarding this as a thing that could be said or done to constitute provocation.⁶⁹ The rationale for removing 'sexual infidelity' was that the Government wanted to make it clear that the victim's unfaithfulness was never a justified reason to reduce a murder charge to manslaughter. It would be unacceptable for a defendant to kill an unfaithful partner and acceptance of sexual infidelity as a trigger would place blame on the victim for what occurred.⁷⁰

The Government felt it was necessary to include this limitation in order to restore public confidence in the fairness of the criminal justice system⁷¹ and also, as Heaton suggested, to please campaigners who had expressed concerns that provocation had been operating as a partial excuse for jealous and possessive men who killed their unfaithful partners.⁷² The exclusion received strong support from a number of organisations.

Improvement to the old law?

The Commission intended that fear of serious violence was sufficient in itself to raise the defence, so proposed to abolish the loss of control requirement. By retaining it the Government added an additional requirement that, as a consequence of the fear, the

⁶⁷ *ibid.*, para.22.

⁶⁸ HC, Public Bill Committee, Maria Eagle, col.439 (March 3, 2009).

⁶⁹ s.55(6)(c) CJA 2009.

⁷⁰ Ministry of Justice, *Summary of Responses*, para.32.

⁷¹ HC, Public Bill Committee, Maria Eagle, col.439 (March 3, 2009).

⁷² deThan, C., and Heaton, R., *Criminal Law*, (2011), p.181.

defendant also lost their self-control.⁷³ This has resulted in the defence not being widened in the way the Commission envisaged and fails to assist those who were intended to benefit from the new law, such as battered women who now “still face the formidable loss of self-control hurdle”⁷⁴

Problems with the sexual infidelity provision

The Government’s exclusion of sexual infidelity as a trigger was widely acclaimed, however the realities of this exclusion have caused much debate. Withey questioned why the Government had signalled out sexual infidelity for exclusion, stating that there were perhaps other situations which could be more ‘worthy’. She offered an interesting theory that some might sympathise with people who kill after discovering their partner’s infidelity, evidencing media reports involving celebrity affairs, which have revealed how the public frown on those who cheat on their partner.⁷⁵ Withey comments that few sympathise with those who commit honour killings, yet there is no express exclusion for these types of cases. In *Mohammed (Faqir)*⁷⁶ a Muslim father stabbed his daughter to death having discovered a young man in her bedroom. In this case provocation was able to be considered by the jury. The Government agreed that loss of control would not be available for this type of killing by stating that the circumstances of the case would not satisfy the other requirements for the defence, such as that the defendant had a ‘justifiable sense of being wronged’.⁷⁷ Nonetheless, by expressly excluding sexual infidelity and not circumstances such as honour killings, the Government could be demonstrating bias. Withey suggested that Parliament had indirectly sent out a moral message regarding those who resort to killing having discovered sexual infidelity.⁷⁸

There has also been significant judicial debate on the interpretation of sexual infidelity. The recent case of *Clinton*⁷⁹ concerned the issue of whether sexual infidelity was prohibited from the jury completely, or whether it could be taken into account where it was integral to the facts as a whole and was only one of a number of factors which caused the defendant to lose control. This issue was raised in the Government report prior to the CJA, where some respondents thought that the drafting of the Act would result in unfair case decisions by excluding acts which were ‘capable’ of providing a basis for the defence on the ground that it

⁷³ Withey, ‘Loss of control, loss of opportunity?’, p.271.

⁷⁴ Mackay, R., and Mitchell, B., ‘Loss of control and diminished responsibility: monitoring the new partial defences’, (2011) 3 *Archbold Review* 5 at p.6.

⁷⁵ Withey, ‘Loss of control, loss of opportunity?’, p.272.

⁷⁶ *Mohammed (Faqir)* [2005] EWCA Crim 1880.

⁷⁷ Ministry of Justice, *Summary of Responses*, para.56.

⁷⁸ Withey, ‘Loss of control, loss of opportunity?’, p.272.

⁷⁹ *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2

may also be considered an act of sexual infidelity. They illustrated that a 'partner raping a child [could be] an act which is automatically excluded as a possible trigger for the loss of self-control [as it] was also infidelity'.⁸⁰

In *Clinton* the court faced 'formidable difficulties presented by an unsatisfactory legislative scheme'.⁸¹ The trial judge ruled that a literal interpretation of the CJA meant that there was no qualifying trigger which could allow the defence to be left to the jury. As such, *Clinton's* evidence of sexual infidelity by the victim (his wife) could not amount to the defence and a conviction of murder was justified. The Court of Appeal held that the meaning of the provision was to 'prohibit the misuse of sexual infidelity as a potential trigger for loss of control in circumstances in which it was thought to have been misused in the former defence of provocation'.⁸²

Therefore, sexual infidelity will not be subject to a 'blanket exclusion'⁸³ when the defence is being considered. Sexual infidelity alone cannot amount to a qualifying trigger, but it may still be relevant when it is fundamental to a situation as a whole. The position of the judiciary was that sexual infidelity could cause extreme emotions of anger and so should be taken into account in such situations.⁸⁴

The judiciary applied the mischief rule when interpreting what was meant by the exclusion of this trigger. The conclusion reached was one that was consistent with the views expressed by the ministers responsible for the legislation, thereby not deferring too far away from the Government's intentions. One such assertion was made by Claire Ward MP, who stated that sexual infidelity is not 'sufficient on its own'⁸⁵ to form a successful defence, but observed that it could be considered if it 'forms part of the background'.⁸⁶

The evidence that *Clinton's* wife had become spiteful and began taunting him over her affair and laughing about his suicidal state, was not considered by the jury in first instance. The trial judge had stated that the remarks made by the wife were to be disregarded as they related to sexual infidelity. However, on appeal it was held that when examining the situation as a whole, there was enough evidence to leave the defence to the jury as the sexual infidelity

⁸⁰ Ministry of Justice, *Summary of Responses*, para.52.

⁸¹ Leigh, L.H., 'Loss of control: the significance of sexual infidelity and other matters', (2012) 2 *Archbold Review* 4 at p.4.

⁸² *Clinton*, as per Lord Judge CJ at para.35.

⁸³ *ibid.*, para.37.

⁸⁴ Recognising that an extreme emotion of anger could provide a sufficient justification to the unjust conduct supports 'imperfect justification' philosophy of the Commission.

⁸⁵ HC, Public Bill Committee, Claire Ward, col.83 (November 9, 2009.)

⁸⁶ *ibid.*, col.94.

was not the main weight of the trigger. Consequently, the Court of Appeal quashed *Clinton*'s murder conviction and ordered a retrial. It should be noted that on the first day of his retrial *Clinton* admitted to murdering his wife and was sentenced for murder.⁸⁷ Nevertheless, despite the u-turn in his plea, the judicial debate on this issue appears to have clarified the position of sexual infidelity.

This is not the view of Leigh who states that some taunts and circumstances surrounding sexual infidelity, where infidelity is not the integral issue, can still be excluded.⁸⁸ The CJA requires that circumstances which caused the defendant to have a justifiable sense of being wronged were of extremely grave character.⁸⁹ Therefore, a problem still arises as it is the jury who consider whether the situation as a whole was grave and it is not clear what test the jury is supposed to apply. The judgement in *Clinton* may not be the last judicial word on this topic as there are more issues which still need to be worked out.⁹⁰ The CJA may have addressed the criticism of broadness with the old defence, but appears to have created new problems, thus suggesting the law has not been reformed effectively.

3 The Objective Test: A 'Characteristic' Catastrophe?

The final stage of the defence provides that the defendant will not be guilty of murder where it is recognised that in those circumstances a person with a normal degree of tolerance and self-restraint would have reacted in the same or a similar way. Section 54(1)(c) states that the defendant will be judged objectively against a person of the same age and sex.

Problems with the objective test

Historically, the position of the judiciary has been to compare the defendant's reactions to those of a 'reasonable man'. The obiter in *Duffy* and the provisions set out under s.3 HA provided that the jury had to decide whether, having been subject to the same provocative conduct as the defendant, a reasonable person would have reacted as the defendant did. There has been wide criticism⁹¹ over the objective test and much judicial debate over the extent to which the defendant's characteristics should be applied to the reasonable person. An entirely objective test that attributed none of the particular characteristics of the defendant

⁸⁷ Jon-Jaques Clinton jailed for murder of wife Dawn, *BBC News*, 4 September 2012 <http://www.bbc.co.uk/news/uk-england-berkshire-19480076>

⁸⁸ Leigh 'Loss of control', p.5.

⁸⁹ 55(4)(a) CJA 2009

⁹⁰ Leigh, 'Loss of control', p.6.

⁹¹ See for example Warburton, D., 'Provocation: objective test - precedent', (2006) 70(2) *Journal of Criminal Law* 121.

was applied in *Bedder*.⁹² However, Lord Diplock departed from this approach in *Camplin*.⁹³ He stated that the jury should take into account certain characteristics of the defendant, such as age, and also share with the reasonable person characteristics that would affect the seriousness of the provocation to him. He clarified that the question put to the jury is not merely would a reasonable person in those circumstances have been provoked to lose self-control, but would they have reacted in the same way as the defendant?⁹⁴

Camplin confirmed that the defendant's age and sex could be relevant factors to consider when applying the objective test. However, this case created uncertainty as to what other characteristics could be taken into account. The House of Lords in *Smith (Morgan)*⁹⁵ departed from *Camplin* and, taking a subjective approach, held on a 3:2 majority that the jury could consider characteristics that affected the defendant's power of self-control, such as a severe depressive mental state.

The landmark case of *Attorney General for Jersey v Holley*⁹⁶ disapproved of the *Smith* approach, with Lord Hoffmann's test of excusability regarded as an 'unwarranted development of the law' in later cases.⁹⁷ *Holley* provided that the reasonable person was a fixed entity and could not be varied to include such characteristics of the defendant as alcoholism or depression. The judiciary preferred the decision in *Camplin*, agreeing that:

the reasonable man ... is a person having the power of self-control...of an ordinary person of the sex and age of the [defendant], but [also] sharing such ...characteristics as they think would *affect the gravity of the provocation to him*⁹⁸ [emphasis added].

The decision in *Holley* was therefore a return to the previous state of the law; an objective rather than subjective test. Although *Holley* was a Privy Council decision and could therefore only serve to act as persuasive precedent, later cases such as *James & Karimi*⁹⁹ chose to apply *Holley* over *Smith*. Returning to an objective test by choosing to apply *Holley* created an 'anomaly'¹⁰⁰ as the judiciary were choosing to ignore the rules of precedent.¹⁰¹ It could be argued that this was because *Holley* was heard by an enlarged board of nine, demonstrating

⁹² *DPP v Bedder* [1954] 1 WLR 1119

⁹³ *R v Camplin* [1978] AC 705.

⁹⁴ *Camplin*, as per Lord Diplock at p.718.

⁹⁵ *R v Smith (Morgan)* [1999] QB 1079.

⁹⁶ *Attorney General for Jersey v Holley* [2005] 2 AC 580.

⁹⁷ *Mohammed (Faquir)*, as per Lord Justice Scott Baker at para.55.

⁹⁸ *Camplin*, as per Lord Diplock at p.718.

⁹⁹ *R v James & Karimi* [2006] 2 WLR 887.

¹⁰⁰ Warburton, D., 'Provocation', at p.124.

¹⁰¹ Nonetheless, Warburton observed that the case was treated as binding due to its importance and the fact that the council deciding comprised of nine English Law Lords. It could be interpreted that the opinions expressed by the Law Lords were a reflection of English law; see p.125.

its importance. Additionally, the fact that it was Supreme Court judges who agreed on this question of law could also suggest why the Court of Appeal followed *Holley* so readily.¹⁰²

The Law Commission's proposals

The Commission noted that there was uncertainty over the reasonable person requirement, citing the conflicting House of Lords and Privy Council decisions. Due to the disagreements on interpretation between the two courts the Commission proposed to clarify the law.¹⁰³ This was also recommended by Lord Nicholls who stated that whilst *Holley* provided an improved test, it was not to be accepted as the last word. He asserted that this concept still needed clarification and reform.¹⁰⁴

The Commission identified that the controversial issue concerned whether the jury should take account of factors such as the defendant's drunkenness or immaturity.¹⁰⁵ The Commission proposed to retain the objective test, but dispense with the notion of a 'reasonable person', instead testing the defendant's reaction against someone of the defendant's age and with ordinary temperament.¹⁰⁶ The jury would therefore consider all the defendant's circumstances, other than those which *only* impacted on the defendant's capacity for self-control.¹⁰⁷ The Commission stated that consideration could be giving to age, such as in *Camplin*, because a person's ability to maintain self-control is an aspect of maturity.¹⁰⁸ Heaton notes that the Commission's recommendations were relatively in line with the old law, thus confirming the objective test under *Holley*¹⁰⁹ and also bringing the law in line with other commonwealth countries.¹¹⁰ By limiting the characteristics which could be accepted and attributed to the reasonable person, the proposals were akin to the dissenting opinions of Lord Hobhouse of Woodborough and Lord Millet in *Smith*.

When having regard to 'all the circumstances of the defendant', the Commission was reluctant to suggest how the provision should be interpreted, but gave examples of certain characteristics that a jury should ignore. The Commission maintain that a defendant whose alcoholism or mental disorder impacts on their temper would have to seek to rely on

¹⁰² *Holley* was decided on a 6:3 majority. Lord Carswell and Lord Bingham dissented along with Lord Hoffman, who had sat on the bench in *Smith* and favoured the subjective approach.

¹⁰³ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.34.

¹⁰⁴ *Holley*, per Lord Nicholls at para.27.

¹⁰⁵ Law Commission, *Murder, Manslaughter and Infanticide*, para.5.37.

¹⁰⁶ *ibid.*, para.5.38.

¹⁰⁷ Williams, G., *Textbook of Criminal Law*, (1983), p.540.

¹⁰⁸ Law Commission, *Partial Defences to Murder*, para.3.110.

¹⁰⁹ deThan, C., and Heaton, R., *Criminal Law*, p.179.

¹¹⁰ Law Commission, *Partial Defences to Murder*, paras.3.93-3.94; Australia, Canada and New Zealand.

diminished responsibility. The rationale for this was that this type of factor constitutes an 'abnormality of mental functioning', unlike age.¹¹¹ Norrie noted, however, that alcoholism will be relevant to the loss of self-control if a taunt was directed at the fact that the defendant was an alcoholic.¹¹²

The Government's response

Agreeing with the Commission, the Government stated that the reasonableness test was to be retained and that it would apply objectively by only taking into account the defendant's age and sex.¹¹³ Miles asserted that the Government was effectively codifying the 'long-running saga'¹¹⁴ relating to the test and concluding that the decision in *Holley* was good law. The Government altered the Commission's proposal that the defendant is judged against a person of 'ordinary' tolerance, by suggesting instead that the comparator should be someone of 'normal' tolerance. This is only a slight change in the terminology and as such does not create a substantially different test.

On the other hand, the addition of 'sex' to the recognised characteristics of the defendant is a more notable and significant change. Although the Government agreed with the Commission's reasoning, Heaton argues that they appear to have misunderstood the proposal as the Commission did not recommend that the self-control expected of the defendant would vary according to their sex.¹¹⁵ Norrie asserts that as the Government did not give any reasoning for adding sex as a factor, its existence in the statute is unclear. He presumes that the Government's reasoning is similar to their reasoning for age, in that sex affects the capacity for self-control.¹¹⁶ The Government are assuming that a man and woman do not share the same levels of tolerance and self-restraint, however, how a person's sex alters their capacity for self-control is unclear as no argument or evidence was put forward.

Carline argues that by including sex the Government are following previous judicial reasoning, such as by Lord Diplock in *Camplin*. She highlights that it is instead the Commission's reasons for *omitting* sex that are interesting. Carline identifies that the Commission intended to adopt a gender neutral approach that men and women share the same standard of tolerance. It was recognition that this gender neutral approach could be problematic for women which caused the Government to reinstate sex as a relevant

¹¹¹ Law Commission, *Murder, Manslaughter and Infanticide*, paras.5.39-5.40.

¹¹² Norrie, 'The Coroners and Justice Act 2009', p.283.

¹¹³ Ministry of Justice, *Summary of Responses*, para.78.

¹¹⁴ Miles, 'The Coroners and Justice Act 2009', p.8.

¹¹⁵ deThan and Heaton, *Criminal Law*, p.180.

¹¹⁶ Norrie, 'The Coroners and Justice Act 2009', p.281.

characteristic.¹¹⁷ There are significant differences that need to be considered in relation to the manner in which men and women kill. The history of gender bias within the defence of provocation is well established and so to ignore sex as a relevant factor is to disregard the Government's aim of creating a more accessible defence for victims of domestic abuse. Carline applauds the Government's explicit recognition of sex.¹¹⁸

Section 54(3) stipulates that factors must be ignored if their *only* relevance to the defendant's conduct is that they affect his tolerance or self-control. An examination into the Government debate offers little enlightenment on the position they wanted to take in concern of characteristics, other than those of age and sex. Withey observes that this is surprising, considering that so much case law has been generated on this aspect in relation to provocation.¹¹⁹

Despite being silent on which further circumstances should be taken into account, the Explanatory Notes identified that a history of domestic abuse suffered by the defendant could be relevant. This express stipulation clarifies the position for battered women and ensures that they do not have to rely on proving such mental states as depression, which is not a relevant characteristic capable of being considered by the jury. The Notes also confirm that the defendant's short temper cannot be taken into account.

Improvement to the old law?

In confirming the *Holley* approach, the Government formalised what was previously just persuasive precedent, thus correcting the anomaly Warburton identified. The judiciary reported to the Commission that under the subjective approach in *Smith*, some juries did not understand the question of what characteristics could be taken into account. One example was *Weller*¹²⁰ where the jury were unsure on the relevance of the defendant's obsessive and jealous character. In contrast, juries understood the application of the *Holley* objective test.¹²¹ On this assurance there should be little complication in interpreting s.54(1)(c). The clarification under s.54 highlights to juries when certain characteristics should be taken into account and as such improves the previous position of the law.

Despite confirming the relevance of some characteristics, Withey suggests that the express

¹¹⁷ Carline, A., 'Reforming Provocation: Perspectives from the Law Commission and the Government', *Web Journal of Current Legal Issues*, April 2009, <http://webjcli.ncl.ac.uk/2009/issue2/carline2.html> 12 December 2012

¹¹⁸ *ibid.*

¹¹⁹ Withey, 'Loss of control, loss of opportunity?' p.277.

¹²⁰ *R v Weller* [2003] Crim LR 724.

¹²¹ Norrie, 'The Coroners and Justice Act 2009', p.282.

reference to sex and age could cause new confusion for the jury. She notes that in certain cases these factors may have no bearing.¹²² This argument is supported by Norrie who points out that self-control is not an aspect of age, but instead maturity. Thereby, in referring to age the law only takes into account a 'rough and ready'¹²³ mark of maturity, instead of realising that two people of the same age could have different maturity levels. The Commission noted that due to the complex subject of mental age, in circumstances where an adult has the maturity level of someone much younger than himself it could perhaps be argued that diminished responsibility would provide a more suitable defence.¹²⁴ However, Norrie considers this suggestion and on assessing the other defence, asserts that an immature person may instead have no suitable defence to rely on,¹²⁵ thus creating an injustice.

In relation to gender, Withey asserts that unless the view is taken that men and women have different levels of self-control, it may have no relevance.¹²⁶ In response to the Government's proposals, the Broken Rainbow organisation¹²⁷ argued that the inclusion of gender within the objective test could reinforce sexism.¹²⁸ They claimed that the 'gender-specific "sex" part of this proposal discriminates unfairly against LGBT defendants', believing that a jury, likely consisting of a heterosexual majority, is perhaps not going to empathise with homosexual or transgender defendants.¹²⁹ Despite their assertions that a jury would have little understanding of how abuse could arise within LGBT relationships, the Government was not persuaded to remove this factor, stating that LGBT defendants will not be unfairly disadvantaged as all the defendant's characteristics will be taken into account, as long as they do not just bear on their general capacity for self-control. Hence, the defendant's sexuality will only be considered by the jury when it is relevant to the provocation.¹³⁰

The new objective test also appears to improve the law for battered women. In referring to the defendant's 'circumstances', as opposed to their 'characteristics', s.54(1)(c) provides that evidence of the defendant's abuse can now be attributed to the comparator when applying the objective test. Instead of portraying the defendant as an abuse victim, Norrie states that

¹²² Withey, 'Loss of control, loss of opportunity?' p.276.

¹²³ Norrie, 'The Coroners and Justice Act 2009', p.281.

¹²⁴ Law Commission, *Partial Defences to Murder*, para.3.134.

¹²⁵ Norrie, 'The Coroners and Justice Act 2009', p.282.

¹²⁶ Withey, 'Loss of control, loss of opportunity?' p.276.

¹²⁷ An organisation that provides support for lesbian, gay, bisexual and transgender people experiencing domestic violence,

¹²⁸ Ministry of Justice, *Summary of Responses*, para.77.

¹²⁹ Ministry of Justice, 'Coroners and Justice Bill: equality impact assessment', <http://webarchive.nationalarchives.gov.uk/20090115180422/www.justice.gov.uk/docs/coroners-justice-bill-ia-homicide.pdf> 15 December 2012.

¹³⁰ *ibid.*

they will be encouraged to portray themselves as ordinary people who have been grievously harmed and are therefore acting out of a legitimate sense of anger over what has been done to them.¹³¹ This is confirmation of how the imperfect justification rationale aims to benefit abused women. Therefore, although the facts of some cases may cause the jury slight difficulty in understanding the relevance of the defendant's age, sex and other circumstances, overall the clarification of the test improves the position of the old law. As commented by Lord Lloyd Berwick, the *Holley* test was 'as certain as any test can be'.¹³²

Conclusion

Having identified many criticisms with the partial defence of provocation, the Government enacted the CJA in an attempt to form a more effective defence. The new loss of control defence was intended to be accessible for defendants who had suffered domestic abuse, so as to stop the injustice created with the old defence and aid battered women. However, an examination of the defence shows that the reform has not had the desired effect the Government intended.

Whilst the objective test has been clarified and the inclusion of a fear trigger has widened the defence, retaining the loss of control requirement is disingenuous and excludes it from those who the reform set out to accommodate. Eliminating the 'sudden' requirement, in an attempt to broaden the defence for battered women, was illogical given that the loss of self-control element was retained. This will likely create problems for the jury in interpreting what is now meant by a loss of self-control as time can still be a relevant factor.

Carline raised the interesting notion that if the Government thought it important enough to abolish the word 'provocation', due to its negative connotations, why did it not think to abolish the phrase 'loss of self-control'?¹³³ With the new defence operating to protect those who act in fear as well as anger, it is arguable that retention of a phrase which suggests only anger and not fear creates an inconsistency.

Whilst the new defence is marginally more accessible for battered women, the hurdles that they faced in using provocation are still present. This creates an issue as despite the Government's attempt to widen the defence to help those who could not previously rely on it, the new law does not appear to have amended the criticisms to create a more effective

¹³¹ Norrie, 'The Coroners and Justice Act 2009', p.287.

¹³² HL Deb Vol. 712 Col. 579 (7 July 2009).

¹³³ Carline, 'Reforming Provocation'

defence.

With the judiciary already facing problems in interpreting the CJA, namely the issue on the importance of sexual infidelity, further reform may be needed. One proposal could be to create a separate defence for defendants who are victims of domestic abuse, without the inclusion of a loss of self-control element. Alternatively, abolishing the s.55(4)(b) requirement that the defendant had a justifiable sense of being wronged could further help battered women in successfully raising the defence. Without needing to assess whether the loss of control was 'justifiable', the jury would not need to put as much weighting on a time lapse which could otherwise weaken a battered woman's justification.¹³⁴

Ultimately, it is up to the Government to decide whether such reforms are needed. Given the infancy of the Act it is unlikely that a reform will be seen in the foreseeable future. Despite appearing not to completely amend the problems identified with provocation, the Government may wish to wait and see whether any vagueness within the CJA can be interpreted and resolved by the judiciary.

¹³⁴ Edwards, S., 'Anger and fear as justifiable precludes for loss of self-control', (2010) 74(3) *Journal of Criminal Law* 223 at p.233.